

The Procedures for Expiring PATRIOT Act Authorities

Like a criminal warrant or court order, the FISA judge must ensure that the government has met all of the statutory requirements before approving a roving wiretap or business record order.

Section 206 Roving Wiretap Authority

- The statutory requirements for a Section 206 Roving Wiretap are:
 - Probable cause that the target of the surveillance is a foreign power or agent of a foreign power
 - **BUT** no U.S. person can be considered a foreign power or agent of a foreign power solely upon the basis of activities protected by the 1st Amendment.
 - Probable cause that the device that is tapped is used or about to be used by a foreign power or agent of a foreign power
 - The information sought is foreign intelligence information
 - That a significant purpose of the surveillance is to obtain foreign intelligence information
 - That such information cannot reasonably be obtained by normal investigative techniques
 - That the actions of the target may have the effect of thwarting the identification.
 - The government must employ minimization requirements – this means ensuring that it does NOT collect non-foreign intelligence information.
 - The court must issue an order for roving authority
 - The government must notify the FISA Court within 10 days after beginning surveillance on a new phone or computer.

Section 215 Business Record Authority

- Section 215 business records have more strict requirements than the grand jury subpoenas used in criminal investigations.
- The statutory requirements for a Section 215 Business Record are:
 - The records must be for (1) a foreign intelligence investigation not concerning a U.S. person, or (2) international terrorism or clandestine intelligence activities.
 - **BUT** an investigation of a U.S. person CANNOT be based solely on activities protected by the 1st Amendment, such as exercise of religion or political protest.
 - There must be reasonable grounds to believe that the items sought are relevant to the investigation
 - Requests for library circulation records, library patron lists, book sales records, book customer lists, firearms sales records, tax return records, educational records, or medical records containing information that would identify a person UNLESS the application to the Court is first approved by the FBI Director, Deputy Director, or head of the FBI's National Security Branch.

- The court must issue an order to obtain the records
- The government must employ minimization requirements – this means ensuring that it does NOT collect non-foreign intelligence information.
- Recipients of 215 orders can challenge the order before the FISA court.

Section 6001 Lone Wolf Definition

- The lone wolf provision amends the definition of “agent of a foreign power” to include individuals engaging in or preparing activities in international terrorism
 - The definition excludes U.S. persons.
 - The definition does not expand or reduce the FISA tools available to the government nor change the procedures necessary to use those tools, including court approval.

National Security Letters

- Some opponents of the temporary extension have raised concerns with National Security Letters (NSLs) as part of their protest to distract the argument from the provisions about to expire.
- NSLs are NOT one of the three expiring provisions and are in no way amended or changed by the temporary extension.
- NSLs are similar to administrative subpoenas and were first authorized in 1986.
- NSLs are generally used to obtain: (1) billing and transactional records maintained by telephone companies and Internet service providers; (2) credit reports and other consumer information maintained by consumer reporting agencies; and (3) financial information maintained by financial institutions.
- NSLs CANNOT be used to obtain the content of emails or telephone calls.
- In 2007 and 2008, the DOJ Inspector General issued reports finding misuse of NSL authority by the FBI.
- The FBI instituted reforms to implement all of the IG’s recommendations for use of NSL authority.
- NSLs are requests for 3rd party records, not records owned by the target. The target does not have an expectation of privacy in those records that would require 4th amendment procedures.